

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

<p>8 ADELAIDE C. DYSON,</p> <p>9 Plaintiff,</p> <p>10 v.</p> <p>11 JO ANNE B. BARNHART,</p> <p>12 Commissioner of Social</p> <p>13 Security,</p> <p>14 Defendant.</p>	<p>)</p> <p>) No. CV-05-3067-CI</p> <p>)</p> <p>) ORDER GRANTING IN PART</p> <p>) PLAINTIFF'S MOTION FOR SUMMARY</p> <p>) JUDGMENT AND REMANDING FOR</p> <p>) ADDITIONAL PROCEEDINGS</p> <p>) PURSUANT TO SENTENCE FOUR OF</p> <p>) 42 U.S.C. § 405(g)</p> <p>)</p> <p>)</p> <p>)</p>
---	---

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 14, 19) submitted for disposition without oral argument on February 21, 2006. Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS IN PART** Plaintiff's Motion for Summary Judgment and remands for additional proceedings pursuant to sentence four of 42 U.S. C. § 405(g).

Plaintiff was 51-years-old at the time of the administrative hearing, a graduate of the University of Washington with past work as a hotel maid, caterer helper, hostess, food server and telephone solicitor. She protectively filed an application for Supplemental

1 Security Income (SSI) benefits on June 13, 2001, alleging disability
2 as of that date due to mental illness, alcoholism, drug addiction,
3 back and foot pain. (Tr. at 22.) Following a denial of benefits at
4 the initial stage and on reconsideration, a hearing was held before
5 Administrative Law Judge Ruperta M. Alexis (ALJ). In 2004, the ALJ
6 denied benefits; review was denied by the Appeals Council. This
7 appeal followed. Jurisdiction is appropriate pursuant to 42 U.S.C.
8 § 405(g).

9 ADMINISTRATIVE DECISION

10 The ALJ concluded Plaintiff had not engaged in substantial
11 gainful activity and suffered from severe impairments, but those
12 impairments did not meet the Listings. (Tr. at 23.) Her impairments
13 included depression with hallucinations and substance abuse disorder
14 in early remission. Plaintiff's testimony was not found fully
15 credible. The ALJ found she had a residual capacity for a full
16 range of all exertional levels of work reduced by moderate
17 difficulties in social functioning and maintaining concentration,
18 persistence or pace. The ALJ concluded Plaintiff could perform her
19 past relevant work and, therefore, was not disabled. (Tr. at 30.)

20 ISSUES

21 The question presented is whether there was substantial
22 evidence to support the ALJ's decision denying benefits and, if so,
23 whether that decision was based on proper legal standards.
24 Plaintiff contends the ALJ erred when she (1) improperly rejected
25 the opinions of the treating physicians; (2) improperly rejected
26 Plaintiff's testimony and that of the lay witnesses; (3) failed to
27 properly determine whether Plaintiff's past work was relevant; (4)

1 posed an incomplete hypothetical to the vocational expert and
2 improperly discounted that testimony; and (5) failed to properly
3 evaluate the claimant's drug and alcohol addiction and her alleged
4 failure to follow prescribed treatment.

5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
7 court set out the standard of review:

8 The decision of the Commissioner may be reversed only if
9 it is not supported by substantial evidence or if it is
10 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
11 1097 (9th Cir. 1999). Substantial evidence is defined as
12 being more than a mere scintilla, but less than a
13 preponderance. *Id.* at 1098. Put another way, substantial
14 evidence is such relevant evidence as a reasonable mind
15 might accept as adequate to support a conclusion.
16 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the
17 evidence is susceptible to more than one rational
18 interpretation, the court may not substitute its judgment
19 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
20 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599
(9th Cir. 1999).

21 The ALJ is responsible for determining credibility,
22 resolving conflicts in medical testimony, and resolving
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
24 Cir. 1995). The ALJ's determinations of law are reviewed
25 *de novo*, although deference is owed to a reasonable
26 construction of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
requirements necessary to establish disability:

Under the Social Security Act, individuals who are
"under a disability" are eligible to receive benefits. 42
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
abnormalities which are demonstrable by medically

1 acceptable clinical and laboratory diagnostic techniques."
2 42 U.S.C. § 423(d)(3). The Act also provides that a
3 claimant will be eligible for benefits only if his
4 impairments "are of such severity that he is not only
5 unable to do his previous work but cannot, considering his
6 age, education and work experience, engage in any other
7 kind of substantial gainful work which exists in the
8 national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
9 the definition of disability consists of both medical and
10 vocational components.

11 In evaluating whether a claimant suffers from a
12 disability, an ALJ must apply a five-step sequential
13 inquiry addressing both components of the definition,
14 until a question is answered affirmatively or negatively
15 in such a way that an ultimate determination can be made.
16 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
17 claimant bears the burden of proving that [s]he is
18 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
19 1999). This requires the presentation of "complete and
20 detailed objective medical reports of h[is] condition from
21 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
22 404.1512(a)-(b), 404.1513(d)).

23 SEVERE IMPAIRMENTS

24 Plaintiff contends the ALJ erred when she rejected the opinion
25 of Dr. Chaudhry who diagnosed Hepatitis C resulting in chronic
26 fatigue and a need to lie down for two hours during the day. (Tr. at
27 289.) Defendant contends there was no objective medical evidence
28 Plaintiff suffered from significant symptoms or limitations due to
chronic fatigue.

At step two of the sequential process, the ALJ must conclude
whether Plaintiff suffers from a "severe" impairment, one which has
more than a slight effect on the claimant's ability to work. To
satisfy step two's requirement of a severe impairment, the claimant
must prove the existence of a physical or mental impairment by
providing medical evidence consisting of signs, symptoms, and
laboratory findings; the claimant's own statement of symptoms alone
will not suffice. 20 C.F.R. § 416.908. The effects of all symptoms

1 must be evaluated on the basis of a medically determinable
2 impairment which can be shown to be the cause of the symptoms. 20
3 C.F.R. § 416.929. Once medical evidence of an underlying impairment
4 has been shown, medical findings are not required to support the
5 alleged severity of pain. *Bunnell v. Sullivan*, 947 F.2d 341, 345
6 (9th Cir. 1991). However, an overly stringent application of the
7 severity requirement violates the statute by denying benefits to
8 claimants who do meet the statutory definition of disabled. *Corrao*
9 *v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994). Thus, the
10 Commissioner has passed regulations which guide dismissal of claims
11 at step two. Those regulations state an impairment may be found to
12 be not severe *only* when evidence establishes a "slight abnormality"
13 on an individual's ability to work. *Yuckert v. Bowen*, 841 F.2d 303,
14 306 (9th Cir. 1988) (citing Social Security Ruling 85-28). The ALJ
15 must consider the combined effect of all of the claimant's
16 impairments on the ability to function, without regard to whether
17 each alone was sufficiently severe. See 42 U.S.C. § 423(d)(2)(B)
18 (Supp. III 1991). The step two inquiry is a *de minimis* screening
19 device to dispose of groundless or frivolous claims. *Bowen v.*
20 *Yuckert*, 482 U.S. 137, 153-154.

21 In addressing the limitations due to hepatitis, the ALJ noted:

22 The evidence also establishes several other non-severe
23 impairments. The claimant has been diagnosed with
24 hepatitis C. In July 2002 the claimant had mildly
25 elevated liver enzymes. The claimant has not reported any
26 significant symptoms nor any limitations related to having
27 hepatitis C. Since the hepatitis C has not caused any
28 restrictions and she is asymptomatic, I find it a non-
severe impairment.

(Tr. at 23, references to exhibits omitted.) A review of the
medical record discloses positive blood test results for hepatitis

1 C beginning in February 2002 with mildly elevated liver enzymes
2 noted in July 2002. (Tr. at 278, 274.) The implications of the
3 disease were discussed with her in August 2002, and interferon as a
4 treatment was mentioned, but not pursued. (Tr. at 271.) The
5 disease or its symptoms were not mentioned again until January 2004,
6 when Dr. Chaudhry recommended a second, follow-up liver function
7 test. (Tr. at 264-272.) The diagnosis was reiterated on March 15,
8 2004 (Tr. at 262) without indication of further treatment or test
9 results. Finally, in June 2004, Dr. Chaudhry opined Plaintiff was
10 limited to sedentary work and noted for the first time Plaintiff
11 would have to lie down two hours daily because of fatigue associated
12 with hepatitis C. (Tr. at 288-89.) Based on the record before the
13 ALJ, the notes of the treating physician none of which reference
14 complaints of chronic fatigue, and the alleged onset date of June
15 2001, there is no evidence to contradict the ALJ's finding the
16 hepatitis C and its limiting effects, if any, were non-severe.

17 1. Credibility Findings

18 Plaintiff contends the ALJ improperly rejected her testimony
19 and that of her lay witnesses. Defendant responds the ALJ correctly
20 rejected the testimony, noting a lack of motivation, inconsistent
21 daily activities, and poor work history.

22 In deciding whether to admit a claimant's subjective symptom
23 testimony, the ALJ must engage in a two-step analysis. *Smolen v.*
24 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,
25 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the
26 claimant must produce objective medical evidence of underlying
27 "impairment," and must show that the impairment, or a combination of

1 impairments, "could reasonably be expected to produce pain or other
2 symptoms." *Id.* at 1281-82. If this test is satisfied, and if there
3 is no evidence of malingering, then the ALJ, under the second step,
4 may reject the claimant's testimony about severity of symptoms with
5 "specific findings stating clear and convincing reasons for doing
6 so." *Id.* at 1284. The ALJ may consider the following factors when
7 weighing the claimant's credibility: "[claimant's] reputation for
8 truthfulness, inconsistencies either in [claimant's] testimony or
9 between [his/her] testimony and [his/her] conduct, [claimant's]
10 daily activities, [his/her] work record, and testimony from
11 physicians and third parties concerning the nature, severity, and
12 effect of the symptoms of which [claimant] complains." *Light v. Soc.*
13 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's
14 credibility finding is supported by substantial evidence in the
15 record, the court may not engage in second-guessing. *See Morgan v.*
16 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If
17 a reason given by the ALJ is not supported by the evidence, the
18 ALJ's decision may be supported under a harmless error standard.
19 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the
20 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,
21 734 F.2d 1378, 1380 (9th Cir. 1984) (same). Here, there is no
22 evidence of malingering; thus, the ALJ must provide clear and
23 convincing reasons for rejecting Plaintiff's testimony.

24 In her opinion, the ALJ commented:

25 The claimant's statements concerning her impairment and
26 its impact on her ability to work are not entirely
27 credible. The claimant has a clear lack of motivation to
28 work as noted by her unimpressive earnings record and the
fact that she has been supported by her parents
(testimony). Moreover, she has described daily activities

1 which are not limited to the extent one would expect,
2 given the complaints of disabling symptoms and
3 limitations. In August 2001 the claimant stated she did
4 housework, washed dishes, shopped, cooked meals, and
5 watched television. She went to the park and attended
6 group meetings. She also used public transportation. In
7 December 2001 she reported being completely independent of
8 daily activities, doing her own cooking, cleaning and
9 grocery shopping. She cares for seven pets and has no
assistance with self-care. She handles her own money.
She attends church three times a week. She claims she has
poor concentration but she went to college and completed
a full semester earning a "B" average grade (testimony).
Also she is able to read the newspaper and watch
television (testimony). These activities are inconsistent
with being "disabled." Further, the State Agency found the
claimant's cognitive functions was [sic] very good.

10 (Tr. at 27, references to exhibits omitted.)

11 A lack of work history may indicate a lack of motivation to
12 work rather than a lack of ability. *Osenbrock v. Apfel*, 240 F.3d
13 1157, 1165-1166 (9th Cir. 2001) (claimant's testimony not credible
14 where restriction of daily activities is a lifestyle choice and
15 indicative of lack of motivation to do more); *Woolf v. Shalala*, 3
16 F.3d 1210, 1214 (8th Cir. 1993) (claimant's credibility is lessened
17 by a poor work history); *Schaal v. Apfel*, 134 F.3d 496, 502 (2nd
18 Cir. 1998) ("[j]ust as good work history may be deemed probative of
19 credibility, poor work history may prove probative as well").
20 Moreover, "[a]n ALJ should explore a claimant's prior work history
21 to determine whether her absence from the workplace cannot be
22 explained adequately (making appropriate a negative inference), or
23 whether her absence is consistent with her claim of disability." *Id.*
24 Here, Plaintiff testified she did not use drugs or alcohol from 1993
25 to 1997 (Tr. at 306); thus, substance abuse was not a factor in
26 securing work during that time period. Yet, Plaintiff has no record

1 of earnings from 1992 through 1999.¹ (Tr. at 69.) Moreover,
2 Plaintiff had sufficient education after 1974 (Tr. at 306) and no
3 apparent medical obstacles prior to 2000 (based on the record before
4 the court) to justify her poor work history, other than a lack of
5 motivation and reliance on parental support.

6 The ALJ also relied on Plaintiff's daily activities, which she
7 found to be inconsistent with disability. Those activities included
8 completing household chores, attending church three times a week and
9 support meetings, using public transportation, caring for pets, and
10 successfully completing a college class. (Tr. at 129, 155, 211.)
11 Those findings are supported by the evidence and are inconsistent
12 with disability based on a psychotic disorder, not otherwise
13 specified.

14 Finally, the medical evidence indicated when Plaintiff used her
15 medications properly, her condition stabilized. (Tr. at 236, 265,
16 269, 285.) Examiner Veltkamp found Plaintiff's limitations were
17 mild (her GAF was assessed at 68, indicative of only mild
18 limitations), and she suggested vocational rehabilitation. (Tr. at
19 157.) Thus, there was no medical evidence from mental health
20 providers to support a finding Plaintiff was disabled other than the
21 initial crisis intervention in February 2001 when Plaintiff's GAF
22 was assessed at 25. However, that assessment was done at the end of
23 a one-year drug and alcohol binge and prior to the use of
24 medication. (Tr. at 128.) Thus, the ALJ's findings are clear and

25
26 ¹It appears Plaintiff was convicted of four different criminal
27 offenses during this time period, served sentences, and participated
28 in a one-year inpatient treatment program in Seattle. (Tr. at 140.)

1 convincing and supported by the record.

2 2. Physical Residual Functional Capacity

3 Plaintiff also contends the ALJ improperly relied on an
4 undated, unsigned RFC completed at least two years prior to the
5 hepatitis C diagnosis when she concluded Plaintiff was able to
6 perform all ranges of exertional capacity. (Tr. at 28, 217.)
7 Plaintiff also contends the ALJ improperly rejected the functional
8 limitations noted by her treating counselor, Peggy Champoux, that
9 Plaintiff would have a moderate limitation in completing a normal
10 work day and week and performing at a consistent pace. (Tr. at
11 286.) Defendant argues the RFC was supported by the evidence,
12 including the medical record that indicated Plaintiff's mental and
13 physical impairments were stabilized with medication as evidenced by
14 her daily activities, which were inconsistent with disability.

15 In addition to the hepatitis C, Plaintiff was treated for
16 fractures of her left fifth toe (Tr. at 268) and left ankle (Tr. at
17 266). There is no evidence these fractures resulted in limitations
18 that met the one year durational requirement. There is also some
19 evidence Plaintiff was treated for low back pain, knee pain and
20 heartburn, but those conditions were stabilized with medication and
21 did not appear to meet durational requirements. (Tr. at 149, 265,
22 288, 292.) It is, however, undisputed, Plaintiff gained 80-90
23 pounds as a side effect to taking anti-psychotic medication. In
24 September 2003, her weight was recorded at 223 pounds; she was 5'6"
25 tall. (Tr. at 269, 323.) Obesity is a factor in determining
26 residual capacity; an ALJ is required to consider the combined
27 effect of obesity with other impairments when determining a

1 claimant's ability to work. *Celaya v. Halter*, 332 F.3d 1177,
2 1181-82 (9th Cir. 2003).

3 Additionally, therapist Peggy Champoux opined in April 2004
4 after three years of medication, that Plaintiff would have a
5 moderate limitation in completing a normal work day and week and
6 performing at a consistent pace. (Tr. at 286.) The court notes
7 the ALJ incorporated the moderate limitation in persistence and pace
8 in her decision (Tr. at 28); however, she failed to address the
9 limitation as it relates to completion of a normal work day and
10 week. Although a mental health therapist is not an acceptable
11 medical source with respect to diagnoses, a therapist may provide
12 evidence of functional limitations. 20 C.F.R. § 416.913(d)(1).
13 Additionally, this limitation is consistent with other moderate
14 limitations noted by Dr. Kester who examined Plaintiff in April
15 2002. (Tr. at 199.)

16 3. Past Relevant Work

17 Plaintiff contends the ALJ erred when she concluded she was
18 able to perform past relevant work, even though she also found
19 Plaintiff's work in the past did not constitute substantial gainful
20 activity (SGA). To be considered "relevant" work under the
21 regulations, past work (1) must have been done within the last 15
22 years, (2) lasted long enough for claimant to learn to do it, and
23 (3) been SGA. See 20 C.F.R. § 416.965(a) (2005). Under that
24 regulation, if past work consists of only off and on or brief
25 periods of time, that work is not applicable. *Id.* Additionally,
26 wages earned must meet a certain amount to establish SGA. 20 C.F.R.
27 § 416.974(b)(2); *Anderson v. Heckler*, 726 F.2d 455, 457 (8th

1 Cir.1984) (claimant's earnings should be averaged over only months
2 worked).

3 Plaintiff argues, while there is evidence to establish the
4 first two factors, there is no evidence as to the third factor, the
5 minimum wage requirement. (Tr. at 72.) Defendant responds the work
6 constituted SGA because Plaintiff quit for non-medical reasons and
7 had she continued to work, her wages would have exceeded SGA levels.

8 Plaintiff reported she worked for two weeks during 1990 as a
9 housekeeper; from May to July 1990, as a full-time restaurant
10 helper; in 1991, six months as a caterer's helper; in 1998, two
11 weeks as a motel maid; in 2000, three months as a telephone
12 solicitor; and in April 2001, two weeks as a hotel maid. (Tr. at
13 72, 113.) Her total lifetime wages did not exceed \$7,000.

14 To be considered SGA from January 1990 to June 1999, wages
15 needed to average \$500 a month (total wages divided by the number of
16 months for quarters worked). 20 C.F.R. § 416.974(a)(3)(b)(2).
17 Plaintiff's reported Social Security earnings record indicates the
18 following amounts earned: 1990: \$1,050.40 during two quarters (six
19 months); 1991: \$3,022.06 during four quarters (24 months); 1998:
20 \$132.99; 2000: \$1,167.94 during one quarter (three months); and
21 2001: \$176.40. In 1990, Plaintiff's wages averaged \$175 a month; in
22 1991, \$126 per month. Thus, they presumptively fell below the SGA
23 presumed amounts. The regulations were amended to reflect an
24 increase minimum wage requirement from July 1999 to December 2000.
25 20 C.F.R. § 416.974(b)(2)(I), Table. During that time, SGA was
26 presumed if wages averaged \$700 per month. Plaintiff's wages in
27 2000 averaged \$389 per month; thus, there is no evidence of SGA.

1 Under this record, Plaintiff has no presumptive SGA. 20 C.F.R. §
2 416.974(b)(3). However, the regulations also provide further
3 evidence may be considered to determine whether work which did not
4 rise to the required earnings level constitutes SGA depending on the
5 year the work was performed or was an unsuccessful work attempt. 20
6 C.F.R. § 416.974(b)(6). The ALJ failed to perform this analysis.

7 4. Grids

8 Plaintiff contends, if she is limited to sedentary work, as of
9 her 50th birthday, she would be disabled under the Grids. 20 C.F.R.,
10 Subpt. P, App. 2, § 201.00(g), and § 201.12. However, the
11 application of that Grid is precluded if recently completed
12 education provides for direct entry into sedentary work. 20 C.F.R.
13 § 201.00(g). In light of Plaintiff's college attendance, this court
14 is unable to assess on the record whether Plaintiff has an ability
15 to enter directly into the work force without a past relevant work
16 history or transferable skills.

17 Case law requires an immediate award of benefits when:

18 (1) the ALJ has failed to provide legally sufficient
19 reasons for rejecting [a medical opinion], (2) there are
20 no outstanding issues that must be resolved before a
21 determination of disability can be made, and (3) it is
clear from the record that the ALJ would be required to
find the claimant disabled were such evidence credited.

22 *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir.), *cert. denied*, 531
23 U.S. 1038 (2000), citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th
24 Cir. 1996). The court has some flexibility in determining whether
25 to remand for an immediate award of benefits or for additional
26 administrative proceedings. *Connett v. Barnhart*, 340 F.3d 871, 876
27 (9th Cir. 2003). Here questions remain whether Plaintiff would be

1 able to perform sedentary work in light of her age, mental
2 limitations, substance addiction, and obesity. Accordingly,

3 **IT IS ORDERED:**

4 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
5 **GRANTED IN PART**; the cause is **REMANDED** for additional proceedings
6 pursuant to sentence four of 42 U.S.C. § 405(g).

7 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
8 **Rec. 19**) is **DENIED**.

9 3. Any application for attorney fees shall be made by
10 separate motion.

11 4. The District Court Executive is directed to file this
12 Order and provide a copy to counsel for Plaintiff and Defendant.
13 The file shall be **CLOSED** and judgment entered for Plaintiff.

14 DATED March 2, 2006.

15
16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
18
19
20
21
22
23
24
25
26
27
28